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In The

# Supreme Court of the United States

OCTOBER TERM, 1986

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RENE PICCARRETO,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR PETITIONER, RENE PICCARRETO**

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED:

1) Does the broad reach of the RICO statute render traditional double jeopardy analysis ineffective to prevent violations of the fifth amendment to the Constitution?

2) Must this Court formulate new rules to effectively address double jeopardy issues and/or due process violations that are now arising and will continue to arise under the RICO statute?

3) Is Federal Rule 804(b)(1) on its face, and as interpreted by the Court in this case, violative of a criminal defendant's constitutional rights to compulsory process and due process of law, where the application of the rule prevents the introduction of exculpatory prior sworn testimony of two key witnesses unavailable to the defense at the time of the trial.

4) The admission of co-conspirator's statements at the trial violated the Federal Rules of Evidence and/or the confrontation clause of the Sixth Amendment.

5) The lack of counsel for the petitioner Marotta, in this setting, affected the rights of all the petitioners to effective assistance of counsel in violation of the Sixth Amendment.

6) The New York corroboration of accomplice testimony requirement is incorporated by law in Federal RICO prosecution and that requirement was ignored in this trial.

7) The testimony of a police officer which was eventually stricken was so highly prejudicial as to require reversal.

8) Consecutive sentences may not be imposed for conspiracy and substantive violations of RICO.

## LIST OF PARTIES

The parties to the proceedings below are the petitioner RENE PICCARRETO, HAROLD J. BOREANAZ of Counsel, 736 Brisbane Building, Buffalo, New York, 14203, and co-defendants, DONALD J. PAONE, EDWARD M. CHIKOFSKY, of Counsel, 41 Madison Avenue, New York, New York 10010, ANTHONY M. COLOMBO, ROBERT M. MURPHY, of Counsel, 112 Franklin Street, Buffalo, New York, 14202, JOSEPH RL ROSSI, HERBERT L. GREENMAN, of Counsel. One Niagara Square, Buffalo, New York 14202, THOMAS E. MAROTTA, JOSEPH LaTONA, of Counsel, 300 Statler Towers, Buffalo, New York 14202, RICHARD J. MARINO, PAUL J. CAMBRIA, JR., of Counsel, One Niagara Square, Buffalo, New York 14202, and SAMUEL J. RUSSOTTI, JOHN F. HUMANN, of Counsel, 736 Brisbane Building, Buffalo, New York, 14203 and the respondents SALVATORE R. MARTOCHE, United States Attorney, Western District of New York, U.S. Courthouse, 25 Niagara Street, Buffalo, New York, 14202 and WILLIAM C. BRYSON, Special Counsel, Department of Justice, P.O. Box 14263, Ben Franklin Station, Washington, D.C., 20044.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR PETITIONER, RENE PICCARRETO**

Petitioner prays that a writ of certiorari issue to review the judgement of the Court of Appeals for the Second Circuit of New York entered on February 5, 1986, affirming petitioner's convictions for a substantive and a conspiracy violation of 18 U.S.C. Sec. 1962(c) and (d), hereinafter referred to as RICO.

## OPINIONS BELOW

Petitioner was found guilty by a jury in the Federal District Court of the Western District of New York and sentenced to serve 40 years, 20 years consecutively on each of a RICO substantive

and conspiracy violation. Petitioner's conviction was affirmed on appeal by the Second Circuit Court of Appeals in an opinion published at 782 F.2d 386.

On March 24, 1986, a motion seeking rehearing en banc was denied.

The Second Circuit Court of Appeals considered and rejected the former jeopardy argument here presented in an opinion published at 717 F.2d 27, and also considered the issue involving the contempt of a Government witness, a police officer, in an opinion published at 746 F.2d 945.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). Petitioner's conviction was affirmed on February 5, 1986, and this petition was filed timely, within 60 days of the order denying the petition for rehearing en banc.

## STATUTES INVOLVED

Title 18 USC 1962

Federal Rules of Evidence:

"Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."

## CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be deprived of life, liberty, or property, without due process of law..." (Fifth Amendment).

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law..." (Fifth Amendment).

"In all criminal prosecutions, the accused shall enjoy the right to...have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Sixth Amendment).

## STATEMENT OF THE CASE: POINT 1

James Massaro was murdered in 1973. Massaro was reputedly connected to a group of individuals who were involved with various criminal activities including arsons and insurance frauds in the Rochester area. It was claimed that he was murdered because he complained about not getting paid for his part in the arsons.

In 1975 two informants, who were facing state murder charges, gave information to a group composed of state and federal authorities concerning their alleged knowledge of the Massaro murder as well as other information about the arsons and other criminal activity.

As a result of this information, in 1976, a RICO indictment was returned against the petitioner and others charging 'acts of racketeering' from June 1, 1969 to August 31, 1973. This indictment generally concerned itself with an arson/insurance fraud scheme.

Prior to the return of the RICO indictment a Monroe County grand jury returned an indictment against the petitioner and others charging them with the murder of Massaro.

An analysis of the two indictments (the 1976 RICO and the 1975 state homicide indictment) shows that the 1973 murder victim, Massaro, was intimately involved in the arson/insurance fraud scheme which formed the basis for the 1976 RICO. An analysis also shows that, according to the informant's story, the same alleged 'enterprise' was the mover behind all the alleged criminal activity. Massaro's connection to the 1976 RICO enterprise was intimate:

(1) Massaro was a named but unindicted co-conspirator in the 1976 RICO Indictment;

(2) Massaro was named in the 1976 RICO Indictment as one of the actors in six of the seven substantive arson counts;

(3) One of the alleged 'reasons' Massaro was killed was because he was complaining about not being paid by the same 'enterprise' for his participation in the same arsons alleged in the 1976 RICO.

Given the above allegations of the informants, it is clear that the killing of Massaro could have legally been included in a single RICO indictment encompassing, as 'acts of racketeering', both the arson/insurance fraud counts and the murder.

The state indictment was tried and the petitioner was convicted. Thereafter, the conviction was vacated on motion of the Monroe County District Attorney due to the use of perjured testimony against the petitioner at the trial. This dismissal constitutes a disposition on the merits.

The 1976 RICO indictment was tried and the petitioner was acquitted in 1977, shortly before his conviction for the Massaro murder was vacated.

The current RICO indictment was returned in 1982. It charged the petitioner and others with numerous and diverse 'acts of racketeering', including the Massaro homicide. All the other al-

leged 'acts of racketeering' post-dated the 1976 RICO indictment and were not the subject of pre-trial objections nor of this appeal.

The same witness who testified at the prior state and federal trial testified about the same subject matter (the Massaro homicide) once again.

Prior to the instant trial, petitioner moved against the inclusion of the Massaro homocide in the instant indictment and appealed to the Second Circuit on the ground that his double jeopardy rights were violated by the inclusion of the Massaro homicide as an 'act of racketeering'. The court applied traditional double jeopardy analysis and held that the indictment was valid. The court did note that a potential due process violation was possible but noted that issue would have to await the outcome of the trial:

> "Withal, we are not insensitive to appellant's concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts — sufficient to establish a pattern of racketeering activity under the statute — and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise." *United States v. Russotti,* 717 F.2d 27, 34 (2d Cir. 1983).

(A) The Second Circuit rejected appellant's argument that the dual sovereignty concept should not be applied with respect to that portion of the 1982 RICO which alleged the Massaro murder as a predicate act. The analysis of this issue although conceding that the investigations leading to the respective state and federal indictment involved a cooperative effort chose to applaud this cooperation as opposed to dealing with the legal result of this cooperation no matter how lauditory it might be. Appellant's claim that at a minimum the issue of cooperation deserved a hearing, the absence of which deprived him of due process, was brushed aside because the federal authorities had removed themselves

from cooperation at the state murder trial. The fact remains that the federal authorities were intimately involved in the investigation of the murder which was in progress at the time of the return of the 1976 RICO. Furthermore, it is undisputed that the federal authorities were aware of appellant's alleged involvement in the Massaro homocide at the time the 1976 RICO indictment was filed. The same two federally protected witnesses constituted the majority of the proof at both the state Massaro murder trial and the 1976 RICO.

Petitioner was convicted upon the instant trial of a single RICO conspiracy count as well as a substantive RICO count. Both counts contained allegations naming the Massaro homocide as a predicate act. On appeal, the Second Circuit affirmed the convictions. While addressing numerous issues in the opinion, the court found it unnecessary to address this due process/ double jeopardy issue.

(B) The original review of the due process jeopardy issue was limited because of the pre-trial status of the appeal. The appeal which considered the conviction agreed that the enterprise was the same from 1971 to 1982. The Massaro homocide had occurred in 1973. The geographic area covered by the conspiracy was the same. In fact, the post 1978 predicate acts allegedly came about as a result of the incareration of the leadership for the Massaro murder and the efforts of a rival group to prevent the resumption of control of the same enterprise by those same leaders after their release. *United States v. Paone,* 782 F.2d 386, 389.

## REASONS FOR GRANTING THE WRIT: 1

### The Due Process Argument

The way it now stands, the government may utilize the RICO statute in the following manner:

1) Indict an individual on RICO charges as being part of a criminal enterprise and allege two or more 'acts of racketeering' consisting of arsons in an insurance fraud scheme.

2) If the trial results in an acquittal, indict the same individual as being part of the same criminal enterprise, only this time allege two or more different 'acts of racketeering', for example, that at the same time the enterprise was engaged in the operation of illegal gambling establishments.

3) If this indictment results in an acquittal, then indict once again, but this time allege different 'acts of racketeering', and on and on.

That is precisely what occurred in this trial. The Massaro homicide could have been included in the 1976 RICO but wasn't. The reason it wasn't included had nothing to do with the law (the case law holds that a RICO indictment can include all kinds of diverse criminal activity as long as that activity is connected in some way with the enterprise. See *United States v. Scotto,* 641 F.2d 47, 54 (2d Cir. 1980)).

There is another way to look at the same issue. Assume the government did include the Massaro homicide in the 1976 indictment. Given the state of the law on the breadth of RICO, would there be any chance for a defendant to sever the Massaro 'act of racketeering' on the basis that it was too remote from the arson-for-hire scheme?

Petitioner asserts that the Massaro homicide would have been held in. If that is so, then the inclusion of the Massaro homicide in the 1982 RICO indictment constitutes error — whether it be a violation of double jeopardy principles, and/or the due process clause, and/or an exercise of the court's supervisory powers, and/or vindictive prosecution.

This holding back of 'acts of racketeering' so as to bring future RICO prosecutions after acquittal violates the fifth amendment

to the constitution. Our position on this appeal is simple, but compelled by the constitution:

When the government returns a RICO indictment, it must include therein all 'acts of racketeering' about which it has knowledge. If these 'acts of racketeering' are related to the enterprise during the time in question they must be included in the indictment or they may not be the subject of another RICO indictment.

This would not result in any "immunity" to members of the same enterprise as to subsequent misconduct.

In other words, the government should not be allowed to "hold back" 'acts of racketeering' so as to be able to bring another RICO after an acquittal.

The Fifth Amendment of the United States Constitution provides, in part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

Among other sanctions, the Double Jeopardy Clause protects against a second prosecution for the same offense. The clause guarantees that the State shall not be permitted to make repeated attempts to convict a person, thereby subjecting him to embarrassment, expense, and/or deal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he my be found guilty. See *United States v. Wilson,* 420 U.S. 332, 342, 43 L.Ed. 2d 232, 241 (1975).

Since the prohibition against placing a defendant in jeopardy more than once for the same offense is not considered to be a "fragile" guarantee, but is a vital safeguard in American society, it is not to be given a narrow, grudging application. Such an application would deprive the prohibition of much of its significance. See *Greene v. United States,* 355 U.S. 184, 198, 2 L.Ed. 2d 199, 210 (1957); and *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed. 2d 187, 196 1977).

Prior to conspiracy statutes, application of the double jeopardy amendment was more straightforward and simple. A person was charged with committing a certain act at a certain time. Once tried, he could not be tried again with committing the same act at the same time.

Once conspiracy prosecutions began to proliferate, the concept of "continuing crime" was introduced and it became apparent that new rules were necessary to protect the rights granted each citizen under the fifth amendment.

As was recognized in *United States v. Mallah,* 503 F.2d 971 (2nd Cir. 1974), when the Government chooses to indict under a continuing crime theory, it must understand that the double jeopardy protection expands to cover the continuing crime charged in the indictment.

*Mallah* involved a conspiracy charge in violation of the Federal Narcotics Law. In that case the defendants had been 11 tried and convicted on a narcotic conspiracy charge alleged to have occurred bewtween January 1st, 1971 and June 14, 1971. After that conviction the Government returned another indictment charging the same defendants with violations of the Federal Conspiracy Law allegedly occurring between January, 1971 and June 1973. *United States v. Mallah, id.* at 982. The defense argued that jeopardy had attached after the first prosecution, because, in fact the two conspiracies were actually the same. The Government took the following position:

"The Government contends that because there were no named co-conspirators common to the two indictments, because different overt acts were alleged in each indictment, because the conspiracy below continued into 1973 whereas the conspiracy in the first indictment ended in May, 1971, and because there is a suggestion in the first indictment that the conspiracy extended to distributing narcotics to the customers in the Midwest whereas the proof in the second indictment established activity only in New York, the two conspiracies are distinct." *id.* at 982.

In *Mallah,* the Second Circuit rejected the Government's position citing *Short v. United States,* 91 F.2d 614, (4th Cir., 1973):

> "Blanket charges of 'continuing' conspiracy with named defendants and with 'other persons to the Grand Jurors unknown' fulfill a useful purpose in the prosecution if crime, but they must not be used in such a way as to contravene constitutional guaranties. If the Government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, *it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charted is barred* and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it, were committed, or by charging different overt acts as having been committed in furtherence of it, or by charging additional objects or the violation of additional statutes within its purview, if in fact the second indictment involves substantially the same conspiracy as the first...The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading. *id.* at 985.

When the 1976 RICO indictment was returned, the government had the option of supporting the RICO charges with any underlying 'acts of racketeering' that it knew, or should have known, and felt it could prove.

As of the return of the 1976 indictment the government did know about the allegations of the Massaro homicide and the proof concerning that matter in this trial was the same proof, from the same witness, that was known to them and could have been offered upon trial of the 1976 RICO. The fact that the government chose not to include the Massaro homicide as one of the underlying acts of racketeering in the 1976 indictment has no bearing on the double jeopardy protection afforded the defendants who were acquitted on those charges.

To hold otherwise this court would have to overrule the precedents set forth in *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1978); *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980); *United States v. LeRoy,* 687 F.2d 610 (2d Cir. 1972); *United States v. Ruggiero,* 726 F.2d 913 (2d Cir. 1984), and others, which give the government the broad power under RICO to include all kinds of predicate acts in a RICO indictment, as long as those acts are related to the activities of the enterprise. A ruling in this case, favorable to this petitioner, will in the long run be beneficial to the government, since it will affirm the broad reach of RICO.

It will be a rare situation where the government will hold back predicate acts in the hope of bringing a future RICO. Not only will it be rare, it will also be unconstitutional. Unfortunately for the government, that is exactly what it did here. This procedure cannot be allowed to stand.

## B. THE JEOPARDY ARGUMENT

### As A Result of the State Prosecution

The first level of the jeopardy issue deals with the state murder prosecution and its subsequent inclusion as a predicate act in the RICO prosecution.

This issue was disposed of below by applying the concept of dual sovereignty.

In 1970, when Congress enacted RICO, a determination was made to include State crimes within the ambit of predicate acts constituting a RICO violation, and providing that two or more of such acts, if committed in furtherance of the affairs of an enterprise within a ten year period constituted a federal crime. This enactment alone requires further clarification of the concept of dual sovereignty as set forth in *United States v. Lanza,* 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922). This is particularly true where, as here, the state and federal indictments are the products of a cooperative effort. If the double jeopardy protection of the

Constitution is to be watered down then it is urged that the Supreme Court is the proper forum to hear argument on this significant issue. RICO prosecutions are proliferating at an unprecedented rate. The legal issue deserves consideration.

## C. AS A RESULT OF PRIOR RICO PROSECUTION

The Second Circuit relied upon *United States v. Turkette,* 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed. 2d 246 (1981) in rejecting this jeopardy issue. That case dealt with whether Congress intended solely to protect legitimate business enterprises from infiltration by racketeers or whether RICO made criminal participation in an enterprise which performs only illegal acts and has not infiltrated a legitimate business. It was held that RICO was equally applicable to a criminal enterprise that had no legitimate purpose because of the intention by Congress to seek the eradication of organized crime.

Here the enterprise consists of an association of people alleged to be in existence solely for the purpose of engaging in criminal activity. The 1976 RICO and the 1982 RICO involved the exact same enterprise which functioned in the same geographic area with petitioner alleged in each instance to be in a leadership position. To allow the Government to claim that both the predicate acts and the enterprise must be the same is to reduce the constitutional prohibition to the level of the draftsmanship involved in an indictment.

The fallacy in this position is best exemplified by the contortion engaged in by the Court below in attmepting to deal with the ancillary but related issue of collateral estoppel. Since Congress has chosen to place the primary focus of the statute on the enterprise, it puts form over substance to allow the manipulation of the constitutional guarantee to the extent here involved.

It is urged that this important issue deserves consideration by the granting of this petition.

## CONCLUSION 1

We assert that due process precludes the use of petitioner's alleged involvement with the enterprise for acts known to the government up to the time of the return of the 1976 indictment. Double jeopardy consideration also bar the use of these allegations. Therefore, that portion of the current indictment which included any factual matter concerning the enterprise that is pre 1976 should have been stricken. Its inclusion constitutes reversible error in this case and the conviction must be reversed. See *United States v. Brown,* 583 F.2d 659 (3rd Cir. 1978).

## STATEMENT OF THE CASE: POINT 2

The petitioner was convicted on federal RICO violations based primarily on the hearsay testimony of immunized government informants. This petition draws into question the constitutionality of that portion of Federal Rule 804(b)(1) which *prevents* a criminal defendant from utilizing the prior sworn testimony of an unavailable witness unless the prosecuting agency at the prior proceeding was identical to the one prosecuting the instant case. This prohibition applies even if the former, but different, prosecutor "had an opportunity or similar motive to develop the testimony". (See Federal Rule 804(b)(1)). The rule is different and more stringent for criminal defendants than it is for civil litigants.

The application of the rule in this trial was violative of petitioner's right to compulsory process since the petitioner was subjected to numerous exceptions to the hearsay rule which caused the admission of such evidence as:

1) admissions of co-conspirators "during the course of and in furtherance of the alleged conspiracy" (Rule 801 (d)(2)(E)).

2) statements of others which were "instructions" or "suggestions" and therefore not subject to hearsay restrictions because such utterances did not assert facts.

3) statements of others which were "recruiting" statements or "instruction" statements, and therefore not in violation of the hearsay rule and therefore admissible against the defendants.

4) declarations of others against penal interest. With this backround of hearsay testimony admitted against the defendants in the case, when it came time for the defense to offer some hearsay in their favor, the application of the Rule prevented the admission of the proof. The prior sworn testimony of two non-testifying defendants concerning two of the charged "acts of racketeering" was ruled inadmissible when offered by their co-defendants. *This was so even though the identical testimony would have been admissible against the defendants if the Government chose to offer it.*

**The Substance Of The Offer**

The testimony that was offered included the state murder trial testimony of the co-defendant Piccarreto and the state grand jury testimony of the co-defendant Colombo.

Piccarreto testified in November of 1976. He was on the witness stand for the better part of a day. The exhibit offered constituted the entirety of his testimony consisting of appropriately 140 pages, about 100 pages of which was extensive cross-examination by the state prosecutor.

The cross-examination went well beyond the crime charged in the state indictment, the murder of Massaro. The cross dealt with the social clubs involved in the case here at issue; and it dealt with Piccarreto's relationship with his co-defendants Russotti and Marotta. As a matter of fact, the cross-examination included in the offer went well beyond what would have been allowed had the witness actually testified in this case. Piccarreto was asked about each of the nine arsons which were the subject of an earlier RICO indictment, then a pending case. At the time of this trial he had already been tried and acquitted on those charges. He was asked

about events which constituted the facts in several other then pending indictments. By the time of this offer he had been cleared of all these charges.

This testimony went well beyond simply denying his participation in the Massaro homicide which was a predicate act in this RICO trial. The testimony directly contradicted the only government witness, Monachino, who testified relative to this predicate act. The cross was so extensive and, in fact, improper, that it caused the defense to move for a mistrial in that case. Despite all of this, the defense here did not attempt to limit the offer or to restrict it in any way.

Monachino was the only witness who gave testimony about the Massaro act of racketeering. The key part of his testimony, as it concerned the petitioner, was his claim that a meeting occurred at Longview Terrace wherein he was ordered by 'the bosses' (Piccarreto, Russotti and another co-defendant) to kill Massaro. Piccarreto testified there was no such meeting. He chose not to testify at this trial. Therefore, his prior sworn testimony was offered by the co-defendant. It should be noted that the meeting which Monachino claimed occurred at 45 Longview Terrace was the subject matter of perjured testimony of law enforcement officers in the state Massaro murder trial which caused the vacating of that conviction.

The co-defendant Colombo's grand jury testimony should have been admitted for many of the same reasons as Piccarreto's trial testimony. It was sworn testimony developed by a state prosecutor. It directly contradicted the Government's contention in regard to testimony on a charged act of racketeering. The testimony concerned the March 13, 1979, Oskie DiMarco incident which was an 'act of racketeering' charged against all the defendants in this case. This 'act of racketeering' affected both the substantive and the conspiracy counts. Colombo underwent extensive questioning by the Monroe County District Attorney's Office concerning the incident. Colombo denied seeing any

weapons that evening; or throwing any weapons out the car window; or having any knowledge of ski masks, *all in direct contradiction of the Government informant Oliveri.* He was asked directly whether or not he had any conversations with anybody concerning killing Oskie DiMarco and answered: "definitely not, no". The court asked the government if the testimony was exculpatory and government counsel agreed that it was. The court sustained the objection of the government to the Colombo testimony, holding that "it's only exculpatory self-serving statements", and that "Colombo was a defendant in this case" and therefore he was not allowing the offer.

If Colombo had testified before a federal grand jury, there would be no argument against the testimony. Under the circumstances of this case, the fact that it was a state and not a federal grand jury is a matter of form and not substance.

In *United States v. Pizarro,* 717 F.2d 336 (7th Cir. 1983), the Court was guided by the Supreme Court's statement in *Chambers v. Mississippi,* 410 U.S. 284 (1973), that "few rights are more fundamental than that of an accused to present witnesses in his own defense." Where a court erroneously excludes "testimony that would have been relevant and material, and...vital to the defense," *Washington v. Texas,* 388 U.S. 14, 17 (1967), thus rendering the defendant's case "far less persuasive than it might have been," *Chambers v. Mississippi, supra,* 410 U.S. at 284, then a new trial must be provided. *United States v. Benveniste,* 564 F.2d 335, 342 (9th Cir. 1977). See *Pizarro, Id.* at p. 351. The Supreme Court has termed this right "a fundamental element of due process of law." *Washington v. Texas, supra.*

## REASON FOR GRANTING THE WRIT: 2

As promulgated and as approved by the court of appeals in this case, Federal Rule of Evidence 804(b)(1) is unconstitutional on its face. The existence of such a situation presents special and important reasons for review by this Court.

Its application bars a criminal defendant from introducing prior exculpatory testimony of an unavailable witness. It violates the sixth amendment right to compulsory process and assistance of counsel and the fifth amendment right to due process of law. It allows a prosecutor to use prior testimony against a defendant in a situation where the identical testimony could not be utilized by a defendant in his defense.

This jury deliberated for seven days. There were difficult and close issues of credibility that had to be addressed by the jury. The government informers included murderers, perjurers, arsonists and drug addicts — all of whom received immunity from the government in exchange for their testimony. The key issue was credibility.

The evidence that was kept from the jury went directly to the credibility of two of the government informants and indirectly to the credibility of the entire case. The barred testimony directly contradicted two of the witnesses concerning "acts of racketeering" charged against the petitioner in the indictment.

The Federal Rules of Evidence became effective January 2, 1975. The rules were to be "construed to secure fairness in administration...and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined" (Rule 102).

The federal rules favor admission of evidence over exclusion if the evidence has *any probative value,* citations omitted, *United States v. King,* 713 F.2d 627, 631, (11th Cir. 1983).

Article 8 addressed the hearsay problem. Under Rule 804(b)(1) former testimony was "not excluded by the hearsay rule if the declarant was unavailable as a witness". Concerning the issue of 'identity of parties', in civil cases, the rule allows the substitution of one who had the right and opportunity to develop the testimony with similar motive and interest at the earlier proceeding. (See the Notes of the Advisory Committee on Proposed Rules).

The rule mandates that where the government seeks to introduce former testimony against a criminal defendant, that defendant must have been a party to the earlier proceeding. This exception was necessary to insure the constitutional rights of confrontation and cross-examination to criminal defendants.

Under the sixth amendment, a criminal defendant has a constitutional right to *cross-examine* witnesses against him (*United States v. Fiore,* 443 F.2d 112, 115 and n.3 (2d Cir. 1971), to *confront* the witnesses against him (*Pointer v. Texas,* 308 U.S. 400, 403-406 (1965), and to *have compulsory process* to obtain witnesses in his favor.

However, regardless of what the rule states, where a criminal defendant seeks to introduce prior exculpatory testimony that is otherwise unavailable, due process and compulsory process mandate admission of such proof, whether or not the "same" governmental agency was present at the prior proceeding. See *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The exclusion of prior testimony, if not developed by the "same" party, was made part of the rule to protect the constitutional rights of criminal defendants. This shield was not meant to become a sword for a prosecutor to bar crucial defense evidence that was otherwise unavailable.

This potential constitutional problem with 804(b)(1) was recognized by legal scholars.

*Weinstein's Evidence* states that,

> "Where, however, it is the defendant in a criminal suit who wishes to use the prior testimony, due process may be required to be admitted against the United States even though a state may have been the prosecuting agency in the prior case." *id* at p.804-98

*McCormick on Evidence,* Third Edition, Section 256 states the following concerning offers by defendants in criminal cases;

> "However, in terms the rule as enacted insists on identity of

> prosecution also, which seemingly would bar a defendant in a federal prosecution from introducing exculpatory testimony from a related State case given by a since deceased witness...exclusion of such evidence implicates due process considerations, and quite likely was not intended by the Congress. See *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The competing interests on this issue were never addressed by the trial court. The appellate court, if they considered the issue, failed to write on it:

> "Other subordinate claims of error include whether the court properly excluded prior sworn testimony of two appellants...We have carefully examined all claims of error raised by all appellants and we find none has merit." *id* at 1489

This issue is important and should be addressed. With the tremendous growth of federal prosecutions, including the RICO statute; with the increase in multiple defendant trials; and the increase in joint state and federal cooperation, there will be more and more situations where Federal Rule 804 is relied upon by litigants. Multiple prosecutions insure situations where witnesses who have testified at prior proceedings will be unavailable for various reasons. The 'same party' limitation which was built into Rule 804 to protect the constitutional rights of criminal defendants cannot be twisted into a sword to bar the use of exculpatory testimony of unavailable witnesses by the same defendants — especially when the same testimony could be utilized by the government against the defendants. The conflict between Federal Rule 804 and the sixth amendment must be addressed.

## CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgement of the Court of Appeals for the Second Circuit of New York entered herein.

Respectfully submitted,

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DATED: May 13, 1986

# APPENDICES

**UNITED STATES of America, Appellee,**

**v.**

**Donald J. PAONE, Anthony M. Colombo, Joseph R. Rossi, a/k/a "The Hop", Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti, a/k/a "Red", Defendants-Appellants.**

**Nos. 84-1454, 84-1466, 84-1467, 84-1468, 84-1469, 84-1470 and 84-1471.**

United States Court of Appeals,
Second Circuit.

Argued Dec. 16, 1985.

Decided Feb. 5, 1986.

Before TIMBERS, MESKILL and PRATT, Circuit Judges.

TIMBERS, Circuit Judge:

Appellants Donald J. Paone, Anthony M. Colombo, Joseph R. Rossi, Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti appeal from judgments of conviction entered December 17 and 21, 1984 in the Western District of New York, Thomas C. Platt, Jr., *District Judge,* sitting by designation.

Following a one and one-half month jury trial, appellants were found guilty of substantive violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and of conspiracy to violate RICO, 18 U.S.C. §§ 1962(c) and 1962(d) (1982). Three of appellants' co-defendants were acquitted by the jury. The district court sentenced each appellant to twenty years imprisonment on each of the two counts upon which they were convicted. Sentences were ordered to run consecutively for appellants Russotti, Piccarreto, Marino, Rossi, and Colombo. For

appellants Marotta and Paone, the sentences were ordered to run concurrently.

We find that the principal issues raised on appeal which warrant discussion in this opinion are (1) whether the admission of co-conspirators' statements at the trial violated the Federal Rules of Evidence or the confrontation clause of the Sixth Amendment; (2) whether appellant Marotta was denied his right to conflict-free counsel because his retained lawyer had represented a government witness seven years earlier; (3) whether the New York corroboration of accomplice testimony requirements is incorporated in a RICO prosecution; and (4) whether the testimony of a Rochester policeman, which the court eventually struck, was so prejudicial as to require a reversal. Other subordinate claims are raised.

Several appellants have adopted by reference points raised in the briefs of their co-appellants pursuant to F.R.A.P. 28(i).

For the reasons set forth below, we affirm the judgments of conviction of each appellant upon each count upon which he was convicted.

## I.

We summarize only those facts believed necessary to an understanding of the principal issues raised on appeal.

Appellants' convictions arose from their participation in the conduct of a criminal enterprise in the Rochester, New York, area during an eleven year period. The indictment charged that between February 1971 and November 1982 appellants participated in a racketeering enterprise that extorted funds from gambling operations, and tried to prevent a rival group from encroaching on its control over gambling activities.

The predicate acts underlying the RICO charge encompassed a variety of serious offenses, including: the murder of Vincent Massaro; the murder of Thomas Didio; the attempted murders

of rival leaders; attempted arson, extortion, and obstruction of justice. Former members of the enterprise testified on behalf of the government regarding these offenses and about appellants' positions in the crime organization. Testimony disclosed that, before gambling joints could operate in the Rochester area, permission had to be obtained from the organization. The gambling clubs paid the organization between $400 and $1800 each week, even though the organization did not provide services to the clubs.

One of the predicate acts included in this RICO indictment was the 1973 murder of Vincent Massaro. In 1977 appellants Russotti, Piccarreto, Marino and Marotta were convicted of this offense in the New York Supreme Court for Monroe County. After they began serving their sentences, it was discovered that sheriff's deputies had committed perjury during the trial. On motion of the Monroe County District Attorney, the judgment was vacated, the indictment was dismissed, and these four appellants therefore were released. During their limited incarceration, disputes arose over the leadership of the organization. Some members were expelled from the organization. A rival group vied for control over the gambling operations. This "war between the factions" led to the murder of rival Thomas Didio, the attempted murder of Rosario Chirico, the attempted murder of Sonny Celestino, and the attempted arson of Chirico's place of business. The activities of this rival group are described in our opinion in *United States v. Barton,* 647 F.2d 224, 228-29 (2 Cir.), *cert. denied,* 454 U.S. 857 (1981).

There of course was a great deal of other evidence, some of which we shall refer to in our discussion of the principal claims of error which follows.

## II.

The government presented its case primarily through the testimony of former members of the enterprise. Appellant Paone

claims that a number of co-conspirator statements concerning the activities of the enterprise were admitted in violation of the Federal Rules of Evidence and the confrontation clause of the Sixth Amendment. We disagree.

Under Fed.R.Evid. 801(d)(2)(E), a statement does not constitute hearsay if it is "offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Appellant asserts that the court allowed government witnesses to testify about statements which did not comply with the timing element that a statement can be made "during" the conspiracy and the motive element that a statement be "in furtherance" of the conspiracy.

[1] Appellant's claim that the court should not have admitted such statements under Rule 801(d)(2)(E) because they were not made "during" the conspiracy rests on the erroneous premise that the indictment related only to criminal conduct which occurred after 1978. The indictment, however, sets forth acts beginning as early as 1971. The RICO indictment centered on appellants' conduct in extorting funds from gambling houses in Rochester. The predicate acts can be traced readily to this criminal design. Vincent Massaro was killed because of his disobedience and his displeasure with his share of the proceeds from the racketeering activity. Also, the rift within the organization, which led to the murders and attempted murders of rival group leaders, erupted during the incarceration of the Massaro murder participants. The gambling houses provided the funds for the operation of the enterprise. Statements made before 1977 relating to the collection of these funds clearly were made during and in furtherance of the conspiracy. We cannot say that the conspiracy began as late as 1977. We therefore reject the claim that the 1973 Massaro murder and the gambling operations antedated the conspiracy. We also are not persuaded that the "in furtherance" requirement is a stringent as appellant urges.

Appellant points to portions of the testimony of government witness Thomas Pelusio as examples of narrative testimony that did not comply with the "in furtherance" requirement of Rule 801(d)(2)(E). Pelusio testified about a conversation concerning the Didio murder, a conversation in which he and some appellants participated. One appellant was reported as commenting on the manner in which Didio was killed, stating that it took only one bullet. Another appellant was reported as saying he wished that he had been present to watch Didio bleed. Other claims of error are based on the admission of testimony relating to 1975 and 1976 gambling operations and the 1973 Massaro murder.

[2] To begin with, in order to comply with the "in furtherance" requirement, there must be evidence that establishes the conspiracy and that the defendant participate in it. 4 Weinstein & Berger, Weinstein's Evidence § 801(d)(2)(E)[01], at 801-244 (1985); *United States v. Lieberman,* 637 F.2d 95, 102 (2 Cir.1980); *United States v. Lyles,* 593 F.2d 182, 194 (2 Cir.), *cert. denied,* 440 U.S. 972 (1979). We are satisfied that the participation of each appellant in the instant conspiracy was established. Once a conspiracy is shown to exist, the "evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Provenzano,* 615 F.2d 37, 45 (2 Cir.), *cert. denied,* 446 U.S. 953 (1980) (quoting *United States v. Head,* 546 F.2d 6, 9-10 (2 Cir.1976), *cert. denied,* 430 U.S. 931 (1977)).

[3] Appellant also asserts that the narrative descriptions by the government witnesses did not satisfy the "in furtherance" requirement. In *United States v. Birnbaum,* 337 F.2d 490, 495 (2 Cir.1964), we recognized that mere idle chatter will not satisfy what is now Rule 801(d)(2)(E). Frequently, however, such statements may be admitted as declarations against penal interest, *Lieberman, supra,* 637 F.2d at 103, or under the state of mind exception to the hearsay rule. *United States v. Cicale,* 691 F.2d 95, 103-05 (2 Cir.1982), *cert. denied,* 460 U.S. 1082 (1983). We also have recognized that the "in furtherance" requirement of Rule

801(d)(2)(E) is satisfied when a co-conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance. *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983); *United States v. Mangan,* 575 F.2d 32, 44 (2 Cir.), *cert. denied,* 439 U.S. 931 (1978). In light of those principles, we are satisfied that there was no error here.

[4] Even if some of the informants' testimony did cross the line, appellant has not convinced us that the instant trial was tainted by any such testimony that might not have comported with Rule 801(d)(2)(E). This trial extended over a period of one and one-half months. In a trial of this length, we are mindful that the chance that a single error, assuming arguendo that such did occur, would be significant enough to cause reversal or mistrial is not as great as appellants would have us believe. "Experience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *United States v. Jones,* 766 F.2d 994, 1004 (6 Cir. 1985) (quoting *In re Beverly Hills Fire Litigation,* 695 F.2d 207, 227 (6 Cir.1982), *cert. denied,* 461 U.S. 929 (1983)).

[5] In addition to his claim under Rule 801(d)(2)(E), appellant asserts that the admission of hearsay statements of co-conspirators violated his rights under the confrontation clause. The statements, according to appellant, did not contain sufficient indicia of reliability. Where co-conspirators' statements are so "crucial" to the prosecution and "devastating" to the defense, according to appellant, the confrontation clause is violated. We do not agree.

In *United States v. Puco,* 476 F.2d 1099, 1107 (2 Cir.), cert. denied, 414 U.S. 844 (1973), in commenting on a petition for rehearing, the Court made clear that, "[W]e did not and do not hold that a trial judge must find, before admitting a co-

conspirator's declaration, that it is not 'crucial' to the Government's case of 'devastating' to the defense." The court also stated:

> "For future applications of *Dutton* [*v. Evans,* 400 U.S. 74 (1970)] to similar situations, we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. . . . In most cases the determination that a declaration is in furtherance of a conspiracy — a determination that the trial judge now must make in every case for admissibility — will decide whether sufficient indicia of reliability were present."

*Id.* at 1107 (footnote omitted). We also have recognized that "a higher standard of reliability is imposed if the hearsay statements are 'crucial' to the Government's case". *United States v. Stratton,* 779 F.2d 820, 830 (2 Cir.1985) (citing *Dutton v. Evans,* 400 U.S. 74 (1970)). As the *Puco* court indicated, however, the cases in which the requirements of the hearsay rule do not provide sufficient indicia of reliability to satisfy the confrontation clause will be rare. *Id.* at 1107-08. "This is true because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant." *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983). *See also United States v. Wright,* 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) (facts did not support departing from general rule that statements in furtherance of conspiracy contain sufficient indicia of reliability to satisfy confrontation clause).

In our view, the facts of the instant case do not warrant our departing from our earlier decisions. We decline appellant's invitation to require more support for a co-conspirator's statement than is required by Rule 801(d)(2)(E). We hold that the admission

of co-conspirator's statements did not violate the confrontation clause.

We acknowledge that the Supreme Court may address the issue of whether out-of-court statements must be addressed separately under the hearsay rules and the confrontation clause. The question appears to be presented in *United States v. Inadi,* 748 F.2d 812 (3 Cir.1985), No. 84-1580, *cert. granted,* 105 S.Ct. 2653 (May 25, 1985).

Appellant's third attack on the admission of co-conspirator declarations is his claim that the court made an inadequate *Geaney* finding. Under *United States v.* Geaney, 417 F.2d 1116 (2 Cir.1969), *cert. denied,* 397 U.S. 1028 (1970), where hearsay evidence in the form of a co-conspirator statement is admitted "subject to connection", the court must determine, when all the evidence has been received, whether the prosecution "has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence, independent of the hearsay utterances." 417 F.2d at 1120.

[6] Appellant asserts that the court was required to make a specific determination with respect to each defendant as to when he joined the conspiracy and the exact non-hearsay evidence that tied him to the conspiracy. There is not such requirement. In *United States v. Perez, supra,* 702 F.2d at 36, we held that "an implicit *Geaney* ruling can be inferred in the trial judge's decision to receive the evidence and to deny a directed verdict of acquittal on the conspiracy charge." Here, the court made a finding that each defendant was a member of the charged conspiracy. There was abundant evidence linking each defendant to the conspiracy. This is sufficient under both *Geaney* and *Perez.*

We hold that the court correctly admitted the co-conspirator's statements.

## III.

[7] Several former members of the conspiracy testified on behalf of the government. Midway through the trial, government witness Monachino, a former member of the enterprise, disclosed on cross-examination that in 1975 attorney Richard Miller, who was representing appellant Marotta at the instant trial, had represented him, Monachino, in obtaining bail when Monachino was arrested on unrelated charges in 1975. Marotta thereupon requested that Miller be discharged as his attorney in the instant case. Marotta sought permission to retain new counsel. The court denied both requests after conducting an exhaustive colloquy with Monachino. Marotta claims that, since his retained attorney, seven years earlier, had represented a government witness who was testifying against Marotta in the instant case, his Sixth Amendment rights were violated. Marotta asserts that the disclosure that the same attorney at widely separated times had represented two men, each of whom was a member of the alleged conspiracy, so prejudiced the proceedings as to require a reversal and new trial. We disagree.

[8]While a defendant has a right to counsel of his choice under the Sixth Amendment, it is not an absolute right. *United States v. Ostrer,* 597 F.2d 337, 341 (2 Cir.1979). *See In Re Grand Jury Subpoena Served Upon John Doe, Esq. (SLOTNICK),* ____F.2d____, ____, (2 Cir.1986) (Jan. 9, 1986). Absent a conflict of interest, a defendant in a criminal case does not have the unfettered right to retain new counsel, particularly after trial has commenced. In determining whether to allow a defendant to retain new counsel, the court must consider whether a severance would then be required, the risks and problems associated with the delay, and whether substitutions would disrupt the proceedings and the administration of justice. *McKee v. Harris,* 649 F.2d 927, 931 (2 Cir.1981), *cert. denied,* 456 U.S. 917 (1982).

[9] We recognize that a defendant in a criminal case is entitled to conflict-free representation. *Cuyler v. Sullivan,* 446 U.S. 335,

349-50 (1980). For the reasons set forth below, however, we find that, if there was any conflict in the instant case, it was abated during the trial.

First, the government did not realize that attorney Miller previously had represented Monachino until the day before Monachino testified. Miller's representation of Monachino had been ten years earlier and was very limited. Miller had shared office space with Monachino's retained lawyer and merely had aided him in applying for bail. Monachino's need for legal representation at that time stemmed from criminal charges wholly unrelated to the instant case. Miller had not represented Monachino in any way since 1975. Second, Monachino waived any attorney-client privilege he had. As Marotta concedes, Miller subjected Monachino to a "disastrous" cross-examination. Third, following a detailed inquiry into the extent of the relationship between Monachino and Miller, the court carefully informed the jury of the limited nature of the prior representation. The court also explained to the jury that there was a limited universe of criminal defense lawyers in the geographic region and that such past representation was not unusual.

The situation here was not nearly as problematic as in the cases which appellant cites where we held that a defendant was denied his right to effective assistance of counsel. *E.g., United States v. Cancilla,* 725 F.2d 867, 870 (2 Cir.1984) (attorney who had engaged in similar criminal conduct lacked incentive to conduct a vigorous defense); *Solina v. United States,* 709 F.2d 160, 167-69 (2 Cir.1983) (defendant represented by unlicensed attorney).

Particularly in light of the trial court's careful instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any prejudice to Marotta, we hold that the court ruled correctly in refusing to allow Marotta to discharge his trial counsel and to retain new counsel midway through the trial that lasted one and one-half months.

## IV.

[10] Six of the predicate acts underlying the RICO indictment were New York state law offenses of murder, attempted murder and attempted arson. Appellant Marino claims that, since New York state law requires corroboration of accomplice testimony to prove these offenses, such acts did not comply with the definition of "racketeering activity" under RICO. We disagree.

The RICO statute, 18 U.S.C. § 1961(1)(A) (1982), defines "racketeering activity" as "any act or threat involving murder, kidnaping, gambling, arson, robbery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year". (emphasis added). Appellant claims that, if an accused cannot be charged in the New York state courts for these offenses in the absence of accomplice testimony corroboration, he cannot be charged under the federal RICO statute. The court overruled appellant's claim in this respect at the close of the government's case and during the pre-charge conference.

We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge. *United States v. Licavoli,* 725 F.2d 1040, 1047 (6 Cir.), *cert. denied,* 104 S.Ct. 3535 (1984). To adopt appellant's reading of "chargeable" would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other — simply because of differences in what are essentially procedural rules. As in *United States v. Bagaric,* 706 F.2d 42, 62-63 (2 Cir.), *cert. denied,* 464 U.S. 840 (1983), we refuse to sanction such inconsistent results. Other courts' interpretations of § 1961(1)(A) support our interpretation of the statute. *See, e.g., United States v. Brown,* 555 F.2d 407, 418 n. 22 (5 Cir.1977), *cert. denied,* 435 U.S. 904 (1978) (rejecting Georgia's accomplice testimony cor-

roboration requirement in a RICO prosecution); *United States v. Licavoli, supra,* 725 F.2d at 1047, and cases cited therein (even though Ohio law precludes separate punishment for conspiracy to murder and murder, each can serve as separate predicate act in a RICO prosecution).

We hold that the district court correctly ruled that the New York corroboration of accomplice testimony requirement is not incorporated in a RICO prosecution.

## V.

[11] Officer Pecora of the Rochester police department was called as a government witness at trial. Pecora's testimony included relating his June 18, 1978 conversation with appellant Marotta. Pecora had relayed to Marotta a description of the "mob war" in the Rochester area, based on descriptions which two informants had provided. Pecora testified that he asked Marotta to comment on the informants' stories. Pecora then repeated in court Marotta's reaction to the informants stories. Pecora's testimony also described appellants Russotti and Piccarreto as leaders of the organization. This hearsay testimony by Pecora on direct examination included the following:

> "Q. What else did you tell him?
>
> A. I also told Mr. Marotta that the first man stated that Sammy Gingello had declared himself over Samuel Russotti and Rene Piccarreto, and that there was no more equal power.
>
> I also told him that the man had stated to me that at approximately two weeks after the murder of Sammy Gingello that the A and the B team had a meeting, and it was suggested that this city be split into two parts with the river — or Main Street being the dividing line; that the A team found this acceptable, but the B team did not, and was primarily opposed to Sonny Celestino, and nothing was resolved at this meeting.

The bombings continued, and — both the A and B team became disorganized. He also stated that the A team was losing its hold by not being effective in taking care of the B team. Also stated to—

. . .

Q. What did you tell him the second man had stated to you?

A. The second man stated that in regards to the beating incident, that the whole problem would have ended with the beatings, but then the pipe bomb was found on Clifford Avenue and that started it all over again.

He stated that — the second man stated that the power structure of Samuel Gingello, Red Russotti and Rene Piccarreto was the same when they got out of jail as it was when they went to jail.

He also stated that the A team was suffering financially as a result of the bombings, and they were having difficulty — the A team was having difficulty — difficulty locating members of the B team.

He also stated that the problem would not be resolved unless at least these people are eliminated.

He also stated that members of the motorcycle club were probably the people that associated with Thomas Torpey.

After telling him these things, Mr. Marotta responded only by saying that he agreed with — with the beatings, what happened in the beatings, but he said there was — he was not sure that exactly happened because he was in jail at the time.

He did say that — those members, those men, were told that—

. . ."

The court first admitted the testimony tentatively, subject to later consideration. The court thereafter considered striking the testimony completely if Pecora did not disclose the identify of the informants. The court next decided to instruct the jury that the testimony was admissible against Marotta only. When Pecora

was recalled for cross-examination, the court finally instructed the jury to disregard completely the controversial testimony of Pecora. Pecora refused to disclose the identity of the informants and was held in contempt.

Pecora appealed to this Court from the order holding him in civil contempt. We vacated the contempt order, holding that Pecora was not required to disclose the identity of the informants since the court had struck Pecora's testimony. *United States v. Russotti,* 746 F.2d 945, 950 (2 Cir.1984). We observed that at that point in the trial the record did not establish such prejudice as to require a retrial because of the Pecora episode. *Id.* Our careful examination of the entire record, including events subsequent to Pecora's being held in contempt, satisfies us that nothing in the Pecora episode warrants disturbing the judgments of conviction.

Appellant Russotti, joined by several of the other appellants, argues that, even though the court struck the testimony eventually, its disclosure was so prejudicial as to require a reversal. Appellants assert that the jury was left with the impression that the informants existed, that what they said was true, and that the officer's reliance on the unnamed informants gave the government's witnesses who were former members of the enterprise increased credibility.

Appellants rely on *Bruton v. United States,* 391 U.S. 123 (1968), for the proposition that their inability to cross-examine the sources of Pecora's testimony violated the confrontation clause. In *Bruton,* the jury had been asked to apply a confession obtained after arrest to the hearsay declarant but not to his co-defendant. The issue before us is whether the court's instruction to the jury to disregard completely the testimony relating to the June 18 conversation was sufficient to obviate any prejudice to appellants.

Appellants Russotti and Piccarreto claim particular prejudice because they were identified as leaders in the organization. Other witnesses, however, testified as to the conduct and leadership po-

sitions of these same appellants in the organization. We are satisfied that the claimed prejudice was not as "devastating" as appellants assert. Moreover, unlike the situation in *Bruton,* the jury was not asked to apply the testimony to only some appellants, nor were these hearsay declarations made "post-arrest".

While we do not applaud the sequence of events here, we are mindful that occasions do arise, particularly during the course of a long trial, where, on balance, it is in the interest of the fair administration of criminal justice that a jury be given corrective instructions. We hold that this is such a case. *See United States v. Nixon,* 779 F.2d 126, 133 (2 Cir.1985). The jury was not asked to perform olympian mental gymnastics. Indeed, the court's expression of grave concern over this testimony during the trial may well have redounded to the benefit of appellants because the court emphasized to the jury the importance of disregarding the testimony entirely.

We hold that the court's corrective instruction to the jury, together with the factors referred to above, obviated any prejudicial impact of Pecora's testimony upon any of the appellants. We hold that the court did not err in any respect in its handling of the Pecora episode, including its refusal to grant appellants' motion for a mistrial.

[12] We believe it is appropriate and necessary to add a word of caution to the government. Preparation for and conduct during this long and somewhat complicated case no doubt were taxing on both the prosecution and defense counsel, as well as on the court. The government's proffer of Pecora's testimony, however, more resembled risk-creating improvisation than fine-tuned choreography. The government should have avoided this potential for prejudice by screening the testimony with appellants' counsel and the court before trial rather than plunging ahead with such hearsay testimony. After carefully reviewing the record, we believe that the government did not intentionally mishandle the proffer of Pecora's testimony. The scrutinizing trial judge abated

the pote..tial prejudice. He displayed the patience of Job and the wisdom of Solomon throughout. We nevertheless reiterate the admonition to government counsel which Judge Newman stated in one aspect of this very case, *United States v. Russotti, supra,* 746 F.2d at 950, except that we underscore that admonition. United States attorneys are charged with knowledge of the decisions of this Court in criminal cases. Any disregard of our admonition in future cases will be dealt with accordingly.

## VI.

Appellants have raised other subordinate claims of error which we do not believe merit discussion.

For example, appellants' claim that the inclusion of the 1973 Massaro murder as a predicate act violated the double jeopardy clause of the Fifth Amendment was rejected by us in an interlocutory appeal. *United States v. Russotti,* 717 F.2d 27 (2 Cir.1983), *cert. denied,* 465 U.S. 1022 (1984). We hold that there is no reason to disturb that decision.

Other subordinate claims of error include whether the predicate acts under RICO were charged and proven adequately; whether the court abused its discretion in denying mid-trial requests for delay; whether the court properly excluded prior sworn testimony of two appellants; whether the court properly refused to allow appellant Marotta's attorney to be called as a witness; whether the government used immunized testimony in its prosecution; and whether consecutive sentences could be imposed for conspiracy and substantive violations of RICO.

We have carefully examined all claims of error raised by all appellants and we find none has merit.

## VII.

To summarize: We hold that the admission of the co-conspirators' statements violated neither the requirements of Fed.R. Evid. 801(d)(2)(E) nor the confrontation clause of the

Sixth Amendment; the limited representation of a government witness by appellant Marotta's retained counsel did not violate Marotta's right to conflict-free counsel; appellants' argument that the New York corroboration of accomplice testimony requirement is incorporated in the RICO definition of racketeering activity is without merit; the court's limiting instruction to the jury was sufficient to obviate any prejudice resulting from Officer Pecora's hearsay statements; and all of appellants' other claims of error, having been carefully considered, are without merit.

Appellants were convicted after a one and one-half month trial on the basis of overwhelming evidence of extraordinarily serious offenses committed over a period of time beginning fifteen years ago. We order that the mandate issue forthwith.

Affirmed.

WDNY
CR 82-156
PLATT

# *United States Court of Appeals*

for the
SECOND CIRCUIT

FILED FEB 5. 1986, United States Court of Appeals, Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eight-six.

Present: HON. WILLIAM H. TIMBERS, HON. THOMAS J. MESKILL, HON. GEORGE C. PRATT, Circuit Judges,

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|---|---|
| UNITED STATES OF AMERICA,<br>Appellee,<br>-V-<br>DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE MOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARRETO, and SAMUEL J. RUSSOTTI, a/k/a "RED",<br>Defendants-Appellants. | Docket Nos. 84-1454<br>84-1466<br>84-1467<br>84-1468<br>84-1469<br>84-1470<br>84-1471 |

Appeals from the United States District Court for the Western District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk
/s/ By: Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
/s/ ELAINE B. GOLDSMITH
Clerk
(Seal)

FILED MAR 19, 1986, United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of March one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA,
Appellee,

v.

THOMAS E. MAROTTA
Defendant-Appellant.

Docket No. 84-1468
84-1454 (L)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-appellant, Thomas E. Marotta.

Upon consideration by the panel that heard the appeal, it is

Order that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

**UNITED STATES of America, Appellee,**

*v.*

Samuel J. RUSSOTTI, Rene Piccarreto, Richard J. Marino, and Thomas E. Marotta, Defendants-Appellants.

Nos. 1367 to 1370, Dockets 83-1054, 83-1055, 83-1056 and 83-1069.

United States Court of Appeals, Second Circuit.

Argued July 11, 1983.

Decided Aug. 29, 1983.

Certiorari Denied Feb. 21, 1984. See 104 S.Ct. 1273.

An order of the United States District Court for the Western District of New York, Michael A. Telesca, J., 555 F.Supp. 1236, denied motions to dismiss an indictment. On appeal by the defendants, the Court of Appeals, Maletz, Senior Judge, sitting by designation, held that: (1) on record showing that, in homicide prosecution, state and federal authorities were acting independently of one another, that federal authorities ultimately withdrew from case and state continued alone, though theretofore there had been cooperative effort between state and federal authorities, doctrine of dual sovereignty was applicable and federal government could prosecute for violations of Racketeer Influenced and Corrupt Organizations Act notwithstanding previous prosecution by the state for murder; (2) earlier and later indictments alleged distinct patterns of racketeering activity under RICO, and thus prosecution did not offend the double jeopardy clause; and (3) even if jury in acquitting defendants on RICO conspiracy count concluded that they were not members of the enterprise, same did not preclude subsequent conspiracy conviction, if two conspiracies were distinct criminal schemes.

Order affirmed.

**1. Criminal Law § 201**

Dual-sovereignty doctrine is subject to qualification that state prosecution cannot be used merely as cover and tool of federal authorities.

**2. Criminal Law § 201**

On record showing that, in homicide prosecution, state and federal authorities were acting independently of one another, that federal authorities ultimately withdrew from case and state continued alone, though theretofore there had been cooperative effort between state and federal authorities, doctrine of dual sovereignty was applicable and federal government could prosecute for violations of Racketeer Influenced and Corrupt Organizations Act notwithstanding previous prosecution by the state for murder. 18 U.S.C.A. §§ 1961-1968.

**3. Criminal Law § 31**

Where there was no reason for ignoring dual-sovereignty rule, subsidiary claim of prosecutorial vindictiveness was necessarily rejected, there being setting involving conduct of two independent sovereigns.

**4. Criminal Law § 1134(10)**

It was not clear that claim of prosecutorial vindictiveness was properly before Court of Appeals on interlocutory appeal, but to extent that such claim was subsidiary to double jeopardy question it was currently reviewable.

**5. Criminal Law § 1134(1)**

Review by Court of Appeals of claims of double jeopardy or collateral estoppel was narrowly circumscribed, given pretrial status of appeal.

**6. Commerce § 82.5**

It is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes, but, rather, the combination of such two elements is the object of punishment under RICO.

**7. Criminal Law § 195(1)**

In order for second indictment under RICO to give rise to valid claim of double jeopardy, it was necessary that both enterprise and pattern of activity alleged in previous indictment be same as those alleged in the later indictment, and if either was different, there was no infirmity under the double jeopardy clause. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. §§ 1961-1968.

**8. Criminal Law § 195(1)**

Earlier and later indictments alleged distinct patterns of racketeering activity under RICO, and thus prosecution did not offend the double jeopardy clause. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. §§ 1961-1968.

**9. Criminal Law § 195(1)**

The same group which during same period of time organizes into different enterprises in order to consummate distinct patterns of racketeering activity may be prosecuted for each without trenching upon constitutional guarantee against double jeopardy. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. §§ 1961-1968.

**10. Judgement § 956(1), 958(1)**

On issue of collateral estoppel, burden is on defendants to show that verdict in previous prosecution decided very issue now in litigation, and court's task is to determine whether rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.

**11. Criminal Law § 195(1)**

Even if jury in acquitting defendants on RICO conspiracy count concluded that they were not members of the enterprise, same did not preclude subsequent conspiracy conviction, if two conspiracies were distinct criminal schemes. 18 U.S.C.A. §§ 1961-1968.

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John F. Humann, Buffalo, N.Y. (Richard Miller, Rochester, N.Y., on brief), for defendants-appellants Russotti and Marotta.

Harold J. Boreanaz, Buffalo, N.Y., for defendant-appellant Piccarreto.

Paul J. Cambria, Jr., Buffalo, N.Y. (Mary Good and Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., on brief), for defendant-appellant Marino.

Kenneth R. Fisher, Sp. Asst. U.S. Atty., Rochester, N.Y. (Salvatore R. Martoche, U.S. Atty., and Robert L. King, Sp. Asst. U.S. Atty., Rochester, N.Y., on brief), for appellee.

Before NEWMAN and WINTER, Circuit Judges, and MALETZ, Senior Judge.*

MALETZ, Senior Judge:

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* Of the United States Court of International Trade, sitting by designation.

Defendants-appellants Samuel J. Russotti, Rene Piccarreto, Richard J. Marino and Thomas E. Marotta appeal from an order of the United States District Court for the Western District of New York, Michael A. Telesca, J., denying their motions to dismiss an indictment filed November 8, 1982. That indictment charges appellants and six others with violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970), commonly known as RICO. *See United States v. Russotti,* 555 F.Supp. 1236 (W.D.N.Y. 1983). The grounds for their appeal are essentially threefold. First, appellants Marino and Piccarreto argue that in view of a 1976 RICO prosecution of them the present RICO indictment should be dismissed as violative of the double jeopardy clause. Second, in 1978 a New York State court judgment convicting all four appellants of the 1973 murder of a Vincent J. Massaro was vacated. The inclusion of that homicide as an underlying RICO predicate offense should be barred, appellants contend, because of an alleged joint federal-state effort to procure that conviction. Third, appellants submit alternatively, that since the government knew of the 1973 Massaro homicide prior to the 1976 RICO indictment, the failure to include that offense as a predicate act in that indictment barred the inclusion of the Massaro homicide as a predicate act in the 1982 RICO indictment.

For the reasons appearing below, we find appellants' contentions without merit and, accordingly, affirm the order of the district court.

## I

### *Background*

In 1976 the government filed a two-count indictment charging defendants Piccarreto, Marino and six others with a RICO substantive violation, as well as RICO conspiracy, 18 U.S.C. §

1962(c) and (d) (1970).[1] The 1976 indictment alleged that from June 1, 1969 to August 31, 1973, Piccarreto and Marino were members of a criminal enterprise which conspired to commit and did commit multiple acts of arson. They were further charged with having devised a scheme to defraud insurance companies by means of false representations as to the facts and circumstances surrounding the fires. The life of the enterprise allegedly ran

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[1] The relevant portions of RICO provide:

* 1961. *Definitions*

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under . . . the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), . . . section 1503 (relating to obstruction of justice), . . . section 1951 (relating to . . . extortion) . . . ;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . .

§ 1962. *Prohibited activities*

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection [ ] . . . (c) of this section.

from June 1, 1969 to August 31, 1973. The first predicate offense was alleged to have occurred on January 26, 1970, and the last on March 17, 1973. On October 7, 1977, a jury returned a verdict of not guilty as to both Piccarreto and Marino.

Also during 1976 all four appellants were convicted in a New York state court of conspiracy in the first degree and murder in the second degree in connection with the homicide of Vincent J. Massaro. However, in 1978 the judgment of conviction was vacated and the indictment dismissed when it was discovered that their convictions had been obtained through the use of perjured testimony of sheriff's deputies. The United States brought civil rights prosecutions against the responsible sheriff's deputies and state prosecutors and secured convictions. It is undisputed that the federal authorities were aware of appellants' alleged involvement in the Massaro homicide at the time the 1976 RICO indictment was filed.

On November 8, 1982 the present RICO indictment was filed against all four appellants and six others charging them with a substantive violation of RICO, 18 U.S.C. § 1962(c), and a conspiracy to violate RICO, 18 U.S.C. § 1962(d). The indictment charges that defendants conspired to and conducted the affairs of an enterprise through a pattern of racketeering activity which included murder, attempted murder, arson, extortion and obstruction of justice. The pattern of racketeering activity is alleged to have occurred from October of 1973 (acts preparatory to the Massaro homicide) to December 17, 1981 (the date of an alleged extortionate act). The life of the enterprise is purported to have run from February 1, 1971 up to the date of the indictment.

With this background we consider at the outset appellants' contention that the dual sovereignty rule is inapplicable to the extent that the 1982 indictment charges appellants with a pattern of racketeering activity which includes as a predicate offense the murder of Vincent Massaro.

## II

### *Dual Sovereignty*

**[1, 2]** Appellants argue that the federal government was so deeply involved in the state murder prosecution as to preclude application of the dual sovereignty rule, at least insofar as the 1982 indictment alleges the Massaro murder as a predicate act of racketeering and an overt act of conspiracy to violate RICO. At a minimum, appellants submit, they are entitled to an evidentiary hearing on this point.

The concept of dual sovereignty is firmly established, and appellants do not take specific issue with it. In addressing the question whether double jeopardy bars a federal prosecution of a defendant already prosecuted for the same act by a state, the Supreme Court answered in the negative in *United States v. Lanza,* 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

*Id.* at 382, 43 S.Ct. at 142. *Accord United States v. Wheeler,* 435 U.S. 313, 320, 98 S.Ct. 1079, 1084, 55 L.Ed.2d 303 (1978); *Abate v. United States,* 359 U.S. 187, 194, 79 S.Ct. 666, 670, 3 L.Ed.2d 729 (1959); *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 681, 3 L.Ed.2d 684 (1959).

However, the doctrine is not unqualified. "The dual sovereignty doctrine is subject to the qualification . . . that a state prosecution cannot be used merely as a cover and a tool of federal authorities." *United States v. Aleman,* 609 F.2d 298, 309 (7th

Cir. 1979), *cert. denied,* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). On this score, appellants argue, the dual sovereignty rule fails here. They contend that the state murder prosecution was merely a cover for the federal authorities who were so substantially involved in the state prosecution that they should not be allowed to relitigate the same issues.

The records shows, though, that in the Massaro prosecution the state and federal authorities were acting independently of one another. The federal authorities ultimately withdrew from the case and the state continued alone. It is true that before this there was a cooperative effort between the state and federal authorities which, appellants insist, completely eroded dual sovereignty. To this contention the district court replied:

> [T]hat factor was present — to some extent — in both *Bartkus* and in *Aleman,* and in both cases the respective courts praised the "cooperation between state and federal authorities [as] a welcome innovation." *United States v. Aleman,* at 309; *Bartkus v. Illinois,* 359 U.S. at 123, 79 S.Ct. at 678. . . . The cooperation between state and federal police agencies and prosecutorial organizations is both laudatory and desired.

555 F.Supp. at 1239. We agree with the district court and conclude that the dual sovereignty rule is fully applicable here.

Appellants present an associated due process argument that they were improperly denied a hearing on the dual sovereignty question. We find this equally unavailing. First, appellants offered little in the way of proof of federal orchestration of the state murder trial other than the barest conclusory allegations. While two witnesses in the state murder trial were admitted to the federal witness protection program, that fact alone does not transform the Massaro trial into a federal prosecution for jeopardy purposes, there being not the slightest indication that the federal authorities manipulated the state process to accomplish that which they could not constitutionally do themselves. *See*

*United States v. Ng,* 699 F.2d 63, 68 (2d Cir. 1983); *United States v. Liddy,* 542 F.2d 76, 79-80 (D.C. Cir. 1976). What is more, the uncontradicted affidavit of Special Assistant United States Attorney Robert L. King describing in detail the limited federal involvement in the Massaro murder trial obviated whatever necessity there may have been for conducting a hearing. In sum, the decision of the district court to deny appellants' motion without a hearing was well within its discretion. *See United States v. Cohen,* 489 F.2d 945, 951-52 (2d Cir. 1973).

**[3, 4]** Finally, given our conclusion that there is no reason for ignoring the dual sovereignty rule here, appellants' subsidiary claim of prosecutorial vindictiveness must perforce be rejected. *United States v. Ng,* 699 F.2d at 68 ("A setting that involves the conduct of two independent sovereigns does not lend itself to the concept of vindictive prosecution").[2]

We next address the question of the preclusive effect, if any, of the 1976 RICO prosecution on the 1982 RICO indictment in issue here.

## III

### *Former Jeopardy*

**[5]** Appellants Marino and Piccarreto launch somewhat divergent attacks against the 1982 indictment based on the 1976 RICO prosecution, but at bottom all contentions are grounded

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[2] Although it is not entirely clear that this latter claim is properly before the court on an interlocutory appeal, *see United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982); *Abney v. United States,* 431 U.S. 651, 662-63, 97 S.Ct. 2034, 2041-42, 52 L.Ed.2d 651 (1977), we nevertheless conclude that to the extent that that claim relates to the double jeopardy question it is reviewable by us at this time. *See United States v. Wright,* 622 F.2d 792, 793 (5th Cir.), *cert. denied,* 449 U.S. 961, 101 S.Ct. 376, 66 L.Ed.2d 229 (1980).

on claims of double jeopardy or collateral estoppel.[3] Our review is, of course, narrowly circumscribed, given the pretrial status of this appeal. *See Abney v. United States,* 431 U.S. 651, 656-62, 97 S.Ct. 2034, 2038-41, 52 L.Ed.2d 651 (1977). The critical double jeopardy inquiry is whether the 1982 indictment would, in effect, seek to punish Marino and Picarreto for any of the same offenses for which they were tried and acquitted in the 1976 RICO prosecution. *See United States v. Solano,* 605 F.2d 1141, 1144 (9th Cir. 1979), *cert. denied sub nom. England v. United States,* 444 U.S. 1020, 100 S.Ct. 677, 62 L.Ed.2d 652 (1980). The answer to this inquiry necessarily depends on what Congress prescribed as the "allowable unit of prosecution." *Sanabria v. United States,* 437 U.S. 54, 69-70, 98 S.Ct. 2170, 2181-82, 57 L.Ed.2d 43 (1977). "[T]hat prescription determines the scope of protection afforded by a prior conviction or acquittal." *Id.* at 70, 98 S.Ct. at 2181.

**[6, 7]** Not surprisingly, appellants and the government take diametrically opposing positions on this issue. Appellants argue that the enterprise is the focal point of RICO, so that acquittal forecloses reprosecution for participation in the same enterprise, even though through a different pattern of racketeering activity. In reaching this conclusion appellants analogize RICO to the crime of conspiracy, with the RICO enterprise being similar to the agreement to engage in criminal conduct, and the pattern of racketeering activity being akin to overt acts. From this, appellants argue, successive conspiracy prosecutions based solely on a different set of overt acts is barred and so too should successive RICO prosecutions where the enterprise is the same.

The government, for its part, counters that it is meaningless to focus exclusively on the enterprise without reference to what it does, citing *United States v. Bagaric,* 706 F.2d 42, 56 (2d Cir. 1983) ("it is logical to characterize any associative group in terms

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[3] Inasmuch as appellants Russotti and Marotta were not named in the 1976 indictment, they do not claim former jeopardy based on the 1976 RICO prosecution. We consider appellants' collateral estoppel argument in Part IV, *infra.*

of what it *does,* rather than by abstract analysis of its structure" [emphasis in original]); and *United States v. Forsythe,* 560 F.2d 1127, 1136 (3d Cir. 1977) ("legislative intent was to make RICO violations dependent upon behavior, not status"). Accordingly, the government labels the 1976 enterprise as the "arson-for-hire" enterprise, and the 1982 enterprise as the "extortion" enterprise, thereby purportedly distinguishing the two for double jeopardy purposes. Through this conduct-oriented characterization, the government argues, the allowable unit of prosecution is properly established.

In answering the question what is the "allowable unit of prosecution" under RICO, the Supreme Court's opinion in *United States v. Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), is of particular guidance:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

*Id.* at 583, 101 S.Ct. at (footnote omitted). Thus, it is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes. Rather, the *combination* of

these two elements is the object of punishment under RICO. *See United States v. Mazzei,* 700 F.2d 85, 88-90 (2d Cir. 1983); *United States v. Phillips,* 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Weisman,* 624 F.2d 1118, 1122 (2d Cir. 1980) (pattern of racketeering activity must be done "in the conduct of the affairs of an 'enterprise' "), *cert. denied,* 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980). Therefore, in order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment. If either is different, there is no infirmity under the double jeopardy clause. *See generally* Note, *RICO and the Liberal Construction Clause,* 66 Cornell L.Rev. 167 (1980).

**[8]** Instructive in this connection is *United States v. Dean,* 647 F.2d 779 (8th Cir. 1981), *modified on other grounds,* 667 F.2d 729 (1981), *cert. denied,* 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982), where the Eighth Circuit adopted a five factor test for determining whether two RICO counts charge two distinct patterns of racketeering activity. Those factors are

> (1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.

*Id.* at 788. Applying these five factors to the present case, first, there is an overlap of approximately two and one-half years in the duration of the two enterprises, from February 1, 1971, the beginning of the "extortion" enterprise, and August 31, 1973, the end of the "arson-for-hire" enterprise. However, there is no

time overlap as to the predicate offenses alleged in the indictments, the last predicate offense alleged in the 1976 indictment having occurred on March 17, 1973, and the first predicate offense alleged in the 1982 indictment — the Massaro homicide — having occurred in October of 1973.

Second, as to the identity of persons involved in the alleged activities, of the eighteen persons indicted in 1976 and 1982 only two individuals are named in both indictments, Piccarreto and Marino.

Third, the racketeering activities charged in each indictment have only one point of conjunction, that being the allegation of arson. However, the act of arson charged in the 1982 indictment post-dates the last act of arson in the 1976 indictment by some five years. Moreover, the arson charged in the 1982 indictment is allegedly in furtherance of an extortion scheme, not the arson-for-hire scheme which was the focus of the 1976 indictment. In our view, there is not overlap of racketeering activities under the third *Dean* factor.

As to the fourth and most significant factor — the nature and scope of the activity the government seeks to punish under each indictment — as previously indicated the 1976 indictment concerned a scheme to defraud insurance companies by deliberately setting fires to insured buildings. The present indictment, by contrast, is directed at a scheme to extort monies from Rochester, New York gambling clubs, to protect the affairs of the enterprise from "rival and competing individuals" through the use of threats, murder and arson, and to avoid detection by committing other illegal acts, including murder and obstruction of justice. There is plainly no convergence of the two indictments in this regard.

Fifth, and finally, the place where the illegal activity took place in both indictments did center around the Rochester, New York area.

Having considered and applied the five *Dean* factors, unavoidable conclusion is that the two indictments allege distinct patterns of racketeering activity. Even assuming an identity of the enterprises, in view of our conclusion that there are two distinct patterns of racketeering present here, the prosecution of Piccarreto and Marino does not offend the double jeopardy clause. Taken to its logical extreme, appellants' argument that the allowable unit of prosecution under RICO is the enterprise would effectively immunize members of that enterprise from any future prosecution following an initial RICO prosecution, regardless of the nature of the subsequent misconduct.

Withal, we are not insensitive to appellants' concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts — sufficient to establish a pattern of racketeering activity under 18 U.S.C. § 1961(5) — and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise.[4] Indeed, appellants contend, an example of just that is presented here with the government's inclusion of the Massaro homicide as a predicate act in the 1982 indictment when the government in fact knew or should have known of that homicide at the time it filed its 1976 indictment. Thus, appellants submit, the Massaro homicide should have been included in the 1976 RICO indictment or not at all. However, the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to

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[4] In *United States v. Huber,* 603 F.2d 387 (2d Cir. 1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 758 (1980), this court noted that "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." *Id.* at 395-96. This court went on to caution strongly against "undue prosecutorial zeal in invoking RICO," *id.* at 396. *See also United States v. Weisman,* 624 F.2d at 1123. *See generally* Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions,* 70 Calif.L.Rev. 724 (1982).

maintain control over the enterprise's membership in furtherance of its *extortion scheme* — a scheme which had no relationship to the 1976 arson-for-hire activity.

In short, we are satisfied that the RICO indictment in the present case passes muster under the five *Dean* factors.

**[9]** Appellants' further argument that RICO is analogous to the crime of conspiracy must fail, for here there exist two distinct criminal endeavors, one whose purpose was to obtain monies through arson for hire and insurance fraud, the other to obtain monies through extortion. Thus, the same group which during the same period of time organizes into different enterprises in order to consummate distinct patterns of racketeering activity may be prosecuted for each without trenching upon the constitutional guarantee against double jeopardy. *See United States v. Bagaric,* 706 F.2d at 55 ("the nature of the misconduct often provides the best clue toward defining the enterprise"); *United States v. Weisman,* 624 F.2d at 1123. *See also United States v. McDonald,* 692 F.2d 376 (5th Cir. 1982) *cert. denied,* ____U.S____ , 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983); *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975). *Cf. Braverman v. United States,* 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942).

## IV

### *Collateral Estoppel*

We consider finally the contention that in light of the 1976 RICO acquittal the government is collaterally estopped from relitigating those issues which were resolved in favor of Marino and Piccarreto.

**[10]** The starting point for determining this collateral estoppel issue is *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In *Ashe* the Supreme Court held that the doctrine of collateral estoppel, as applied to criminal proceed-

ings precludes the government from relitigating an issue of ultimate fact involving the same parties that was *necessarily* determined in favor of a defendant. *Id.* at 444, 90 S.Ct. at 1194. The burden is on defendants to show that the verdict in the 1976 RICO prosecution decided the very issue now in litigation. *United States v. Mespoulede,* 597 F.2d 329, 333 (2d Cir. 1979); *United States v. Cala,* 521 F.2d 605, 608 (2d Cir. 1975); *United States v. Tramunti,* 500 F.2d 1334, 1346 (2d Cir. 1974), *cert. denied,* 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974). Our task is to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe,* 397 U.S. at 444, 90 S.Ct. at 1194.

**[11]** Here, Marino and Piccarreto contend that their 1977 acquittal on RICO charges necessarily means that the jury concluded that they were not members of the enterprise. However, as the government submits and as a fair reading of the 1982 indictment indicates, that indictment charges defendants with membership in an enterprise wholly different from that described in the 1976 indictment. Further, without engaging in a hypertechnical construction of the jury's verdict, *United States v. Mespoulede,* 597 F.2d at 333, there exists a "plausible explanation[ ] for the jury's failure to convict," *United States v. King,* 563 F.2d 559, 561 (2d Cir. 1977), *cert. denied,* 435 U.S. 918, 98 S.Ct. 1476, 55 L.Ed.2d 510 (1978), even assuming that the enterprise in each indictment is the same. The acquittal of Marino and Piccarreto could have been the result of a jury determination that while they were members of the enterprise, they did not participate in the arson-for-hire or insurance fraud schemes. As for their acquittal on the RICO conspiracy count, even assuming that the jury concluded that they were not members of the enterprise, this does not preclude a subsequent conspiracy conviction, provided the two conspiracies are distinct criminal schemes. *United States v. Sturman,* 679 F.2d 840, 844 & n. 9 (11th Cir. 1982), *cert. denied,*

____U.S.____ , 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983); *United States v. Papa,* 533 F.2d 815, 822 (2d Cir. 1976), *cert. denied,* 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329 (1976). Here, there is "nothing to suggest that the success of one [conspiracy to commit one particular scheme] was in any way dependent upon or related to the other" conspiracy. *Papa,* 533 F.2d at 822.

In brief, at this stage of the proceedings, we fail to see any indication of an attempt by the government "to persuade a second jury of the same fact already litigated" in defendants' favor. *Mespoulede,* 597 F.2d at 335. On this record, the government is thus not barred from charging Marino and Piccarreto with either a new RICO conspiracy or a new substantive RICO offense.

V

For the foregoing reasons, the order of the district court denying appellants' motions to dismiss the indictment is affirmed.